

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05CV0329-GKF-PJC

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS'  
MOTION TO MODIFY SCHEDULING ORDER [DKT. #2021]**

Come now the Defendants in the above-styled cause, and for their Joint Response in Opposition to the Plaintiffs' Motion to Modify the Court's April 24, 2009 Scheduling Order to extend the date for certain of the Plaintiffs' anticipated *Daubert* motions for Defendants' experts, [Dkt. #2021], state as follows, to-wit:

**I. BACKGROUND**

In its April 24, 2009 Revised Scheduling Order, this Court contemplated the precise issues presented in Plaintiffs' Motion to Modify the Scheduling Order. [Dkt. Nos. 2003 and 2021, respectively]. Specifically, the Court was aware that the Magistrate Judge had granted leave to take certain depositions after the discovery deadline, and thus set two deadlines for *Daubert* Motions—May 18, 2009 for challenging experts deposed on or before May 4, 2009, and June 19, 2009 for challenging experts deposed after May 4, 2009. [Dkt. #2003]. Nevertheless, Plaintiffs contend that these deadlines do not provide adequate time for crafting “focused” *Daubert* motions, particularly in regard to defense experts Johnson, Horne, Myoda, Sullivan, Bierman, Chadwick, Cummins, and Merritt. [Dkt. #2021 at 2].

## II. DISCUSSION

### A. The Plaintiffs' requested deadline extension for *Daubert* motions regarding Johnson, Horne, Myoda, Sullivan and Bierman should be denied.

The Plaintiffs have had ample time to prepare any potential *Daubert* Motions regarding defense experts Johnson, Horne, Myoda, Sullivan and Bierman. The reports of these experts were produced to Plaintiffs months ago, all having been timely produced in accordance with the scheduling orders in the case. Additionally, their opinions were examined at length by Plaintiffs in depositions some time ago. This is demonstrated in the chart below:

Expert	<i>Daubert</i> Motion Deadline	Date of Report Production	Days to Draft <i>Daubert</i> Motion after Report	Deposition Date	Days to Draft <i>Daubert</i> Motion after Deposition
Johnson	05/18/09	12/01/08	168 days	02/24/09 02/25/09	81 days
Horne	05/18/09	01/30/09	108 days	03/05/09 03/06/09	73 days
Myoda	05/18/09	12/01/08	168 days	03/18/09 03/19/09	60 days
Sullivan	05/18/09	01/30/09	108 days	04/07/09 04/08/09	40 days
Bierman	05/18/09	01/23/09	115 days	04/14/09 04/15/09	33 days

As the chart demonstrates, the Plaintiffs have had the final reports for these experts in their possession for 3 ½ to nearly 6 months, and they were deposed anywhere from over 1 to nearly 3 months in advance of the Court's May 18, 2009 *Daubert*

deadline. This is more than ample time to prepare *Daubert* motions based on their opinions in the case. Accordingly, the Court should deny the requested extension with respect to these particular defense experts.

**B. The Plaintiffs' requested deadline extension for *Daubert* motions regarding Chadwick, Cummins, and Merritt should be denied.**

The Plaintiffs received the expert report of Chadwick and the separate expert report of Chadwick, Cummins, and Merritt on January 30, 2009. There have been no errata or updates to these reports in the interim. Prior to the issuance of their reports -- on August 8, 2008 -- the Magistrate Judge granted a limited extension to permit Chadwick, Cummins, and Merritt to conduct and report on spring sampling results and seasonal observations. [Dkt. #1756]. This extension allows them to issue a follow-up report on the spring sampling, which is due on May 29, 2009. The reporting on spring sampling activities does not provide an opportunity to alter the reports that were already issued on January 30, 2009, nor does it suggest that there will be any substantive changes to the methodologies already employed by these defense experts and explained in those earlier reports. Therefore, the Plaintiffs have had sufficient information to prepare adequate *Daubert* challenges to the methods utilized by these experts and to the bases for their opinions for some time now.

Moreover, because these experts will not be deposed before May 4, 2009, any *Daubert* challenges to their opinions are not due until June 19, 2009 under the current Scheduling Order. By that date, the Plaintiffs will have had the January 30, 2009 reports of these experts for 4 ½ months, and they will have had the limited follow-up spring sampling report for about 3 weeks. Defendants contend that Plaintiffs are able to draft

motions regarding Chadwick, Cummins, and Merritt on or before June 19, 2009. Therefore, the Court should deny the Plaintiffs' request for an extension on *Daubert* motions to the extent the Plaintiffs' Motion to Modify relates specifically to the opinions of these three defense experts.

### III. CONCLUSION

For the reasons stated herein, the Defendants respectfully request the Court deny the Plaintiffs' Motion to Modify the Court's April 24, 2009 Scheduling Order to extend the date for certain of the Plaintiffs' *Daubert* motions for Defendants' experts, and for any and all other relief to which they may be entitled.

Respectfully submitted,

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